No. 90-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NORWEST BANK DULUTH, N.A.,
Petitioner,

v.

MINNESOTA COMMISSIONER OF REVENUE and the STATE OF MINNESOTA,
Respondents.

CAMBRIDGE STATE BANK, *et al.*,
Petitioners,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Respondent.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

---

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTRODUCTORY STATEMENT

This brief is submitted by the Committee on State Taxation of the Council of State Chambers of Commerce as *amicus curiae* in support of the petitioners' petition for writ of certiorari in the above-captioned case. Written consents of the petitioners and respondents have been obtained and filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The Council of State Chambers of Commerce (Council), organized in 1932, consists of 43 state chambers of commerce. The Committee on State Taxation (COST), an advisory committee of the Council, consists of 360 corporate members. COST member corporations conduct a substantial portion of the interstate commerce in the United States. The members are representative of that part of the Nation's business sector which is most directly affected by the state taxation of interstate operations.

COST's objective is to preserve and promote equitable and non-discriminatory state and local taxation of corporations doing business in more than one taxing jurisdiction. This objective is accomplished, in part, through the promotion of procedural rights of taxpayers. These procedural rights assure taxpayers a full and fair opportunity to contest the legality of state taxes and to receive a meaningful remedy when state taxes are ultimately found to be illegal or unconstitutional. COST is, therefore, vitally interested in cases such as the instant case, in which the State of Minnesota has denied taxpayers a meaningful remedy from the State's levy of an unconstitutional tax.

SUMMARY OF ARGUMENT

The issue in this case is whether the Due Process Clause requires a State to refund taxes collected in violation of federal statutes and the intergovernmental tax immunity doctrine under the Supremacy Clause.

The taxpayers in this case challenged the Minnesota Bank Excise Tax, which included interest from federal obligations in the tax base, but excluded interest from certain state obligations. The tax at issue was virtually identical to that found unconstitutional in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983). The State conceded that the tax scheme discriminated against the

federal government. *Cambridge State Bank v. Roemer*, 457 N.W.2d 718 (1990), Appendix p. 7A. The Minnesota Supreme Court correctly found that Minnesota's tax scheme was a discriminatory franchise tax which violated 31 U.S.C. Sec. 3124; and that the tax scheme violated the intergovernmental tax immunity doctrine. However, the Court refused to remedy that discrimination, holding that the taxpayers were not entitled to a refund of the illegally collected tax. The effect of the decision was to sustain the tax for the tax period at issue despite the fact that neither the State nor the court questioned the violation of 31 U.S.C. Sec. 3124 for that period.

Unlike this Court's recent decisions in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990), *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990), *Ashland Oil, Inc. v. Caryl*, 110 S.Ct. 3202 (1990) and *National Mines Corp. v. Caryl*, 110 S.Ct. 3205 (1990), all of which involve the question of how a Commerce Clause ruling of this Court was to be applied, this case involves neither the Commerce Clause nor the question of how a decision of this Court is to be applied. Rather, this case involves a violation of a federal statute. The appropriate remedy for the harm caused by Minnesota's illegal tax is to refund the improperly imposed taxes to taxpayers who have followed the State's refund procedure. See, *Montana National Bank v. Yellowstone County*, 276 U.S. 499 (1928); *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920); *Carpenter v. Shaw*, 280 U.S. 363 (1930).

The decision of the Minnesota Supreme Court is the first state court decision involving the retention of illegally collected taxes to be issued after this Court's decisions in *McKesson*, *supra*, and *American Trucking*, *supra*. The decision distinctly shows the confusion that still exists regarding what is required to provide a meaningful remedy when states refuse to refund unconstitutional

and illegal taxes. An even more fundamental flaw in the reasoning of the court below is that court's apparent confusion of the reasoning of *American Trucking*, which dealt with the prospective/retrospective application of a Commerce Clause decision of this Court, with *McKesson*, which dealt with the due process requirements that attend the determination of the appropriate remedy to be accorded the payor of a tax imposed in violation of federal law.

The decision and its inventive reasoning clearly show the lengths to which state courts will go in order to protect state treasuries. Rather than correctly analyze this case by determining what actions a State must take to remedy the imposition of a tax in violation of federal law, the Minnesota Court incorrectly chose to cast this case in terms of "prospectivity". As the Minnesota decision so clearly shows, this "prospectivity doctrine" can be turned and twisted in any way necessary to justify the result a court wishes to reach.

Moreover, the Minnesota Court determined that because the taxpayers filed their returns in compliance with State law and took advantage of exemptions available to them, they were allegedly estopped from claiming any remedy for the State's imposition of an illegal tax. The Court's acceptance of this argument does reflect a certain nimbleness of wit, but it shows a total disregard for precedent. See, *Montana National Bank*, *supra*. And its effective approval of the tax scheme for the tax period in issue reflects a total disregard for the federal statute involved. It is imperative that this Court clarify the constitutional remedial requirements that bind the state courts and that it show that, until the state courts follow those mandates, this Court will act to protect the rights of taxpayers.

ARGUMENT

A STATE MUST REFUND ILLEGAL TAXES COLLECTED IN VIOLATION OF THE SUPREMACY CLAUSE

It is agreed in this case that Minnesota's Bank Excise Tax discriminated against the federal government in that the tax included in its base interest from federal obligations while exempting the interest from certain state obligations. Thus, the tax violated 31 U.S.C. Sec. 3124 and violated the intergovernmental tax immunity doctrine, thereby contravening the Supremacy Clause of the United States Constitution. Consequently, the only issue before this Court is whether a State, in refusing to provide a remedy for its imposition of a tax in violation of federal law, has violated the Due Process Clause.

By including the interest from federal obligations in its tax base, the State of Minnesota attempted to tax income that under the Constitution and federal law are exempt from state taxation. *Phillips Chemical Co. v. Dumas School District*, 361 U.S. 376 (1960). A tax which unconstitutionally discriminates against the federal government is void and may not be exacted. *Moses Lake Homes v. Grant County*, 365 U.S. 744, 752 (1961). As this Court noted, when a State attempts to impose a tax which is beyond the State's power to impose "[t]he State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid. . .". *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238, 2251 (1990).

McKesson and the cases discussed therein make clear that due process requires that a state provide a clear and certain remedy where it has exacted an illegal or unconstitutional tax. *Id.* Moreover, a prospective declaration of unconstitutionality does not constitute an ade-

quate remedy.[1] The State must actually erase the property deprivation in order to comply with the Fourteenth Amendment. *Id.* The decision of the Minnesota Supreme Court fails to do so. As in *McKesson*, the State has suggested that in order to redress an unconstitutional deprivation, the State need not actually impose a constitutional tax scheme, but need only place the taxpayer in the same tax position that it would have been placed by a hypothetical scheme. This Court "implicitly rejected this line of reasoning in *Montana National Bank* and *Bennet*, and . . . expressly [did] so [in *McKesson*]. 110 S.Ct. at 2253. The State's duty under the Due Process Clause to provide a clear and certain remedy requires it to ensure that the tax as actually imposed on the taxpayer does not violate federal law and the Supremacy Clause. *Id.* at 2251.

In *McKesson*, this Court recognized that a State could devise a range of remedies to ensure that the tax actually imposed on the taxpayer ~~did~~ not discriminate in violation of the Constitution and could use refunds, retro-

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[1] Nor is the issue in this case one of prospective or retroactive application of a decision as in *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990). *American Trucking* determined when a *holding* of this Court is to be applied prospectively. *Id.* at 2331. At issue in the instant case is the effective date of the codification of a constitutional principle in 31 U.S.C. Sec. 3124. Any decision regarding the construction of a statute is simply a holding "that the law always meant what the court now says it means. The court has . . . no power by change in construction to date its passage as a law from the time of the later decision." *Fleming v. Fleming*, 264 U.S. 29, 31-32 (1924). As pointed out by this Court in *McKesson*, under the dissent and Justice Scalia's concurrence in *American Trucking*, there is no question of retroactivity and under the position of the plurality, the decision would be retroactive insofar as the decision was "clear under the principles established in [this Court's] previous cases. *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 398 (1983), *McKesson*, 110 S.Ct. at 2247, fn. 15.

active taxation (within limits) or a combination thereof. *Id.* at 2254-2255. This is consistent with this Court's earlier decision in *Montana National Bank* which "held that one forced to pay a discriminatorily high tax in violation of federal law is entitled, *in addition to prospective relief, to a refund of the excess tax paid*—at least unless the disparity is removed in some other manner." *McKesson*, 110 S.Ct. at 2249 (emphasis added).

In the instant case, the State will not, or cannot, remove the tax disparity in any manner other than through a refund of the unconstitutional tax. The State has admitted that it would not remove the discrimination against federal obligations by retroactively assessing tax on the exempt state obligations. *Cambridge, supra*, Appendix p. 10A. And, although this Court recognized retroactive taxation as a means of providing a remedy, it also recognized that there were constitutional restraints in doing so. *McKesson*, 110 S.Ct. at 2252. Certainly, retroactively imposing a tax eleven years later and far beyond the State's statute of limitations cannot be within such constitutional limits. *McKesson*, 110 S.Ct. at 2252, fn. 23. Further, under the circumstances of this case it would be anomalous to correct the unconstitutional discrimination by imposing additional taxes on those who originally suffered the discrimination. That would not be a remedy; it would be a punishment for vindicating one's rights. Thus, the only remedy which will correct the Supremacy Clause violation and which will comport with the Due Process Clause is to require the State to refund the illegally collected taxes.

CONCLUSION

For the reasons set forth above, the Committee on State Taxation of the Council of State Chambers of Commerce respectfully requests that petitioners' petition for writ of certiorari be granted.

Respectfully submitted,

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